United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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76-1044

To be argued by
GARY A. WOODFIELD

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1044

UNITED STATES OF AMERICA,

Appellee,

—against—

VIRGIL ALESSI,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Preliminary Statement

Virgil Alessi appeals from an Order of the United States District Court for the Eastern District of New York (Judd, *J.*), entered on January 21, 1976, which denied his motion to dismiss the indictment, 75 Cr. 295, on alleged double jeopardy and due process grounds. The district court, however, rejected appellant's argument that his previously entered plea of guilty to an unrelated narcotics conspiracy overlapped the instant indictment which charges him with income tax evasion. Similarly, Judge Judd rejected appellant's contention that the plea bargain entered into with regard to the narcotics conspiracy guilty plea could be construed to cover the instant indictment.

Appellant, abandoning the double jeopardy aspect of his argument raised in the district court, now presses his

contention that the disposition of the narcotics charges against him operate to bar prosecution on the instant income tax indictment by reason of the due process clause of the Fifth Amendment.

Statement of Facts

On January 24, 1972 a grand jury sitting in the Eastern District of New York returned an indictment (72 Cr. 88), which charged appellant and others with conspiracy to violate the narcotics laws. Thereafter, on April 17, 1972, a second indictment (72 Cr. 433) was returned in the Eastern District of New York which similarly charged appellant and others with a conspiracy to violate the narcotic laws. On May 1, 1972, indictments 72 Cr. 88 and 72 Cr. 433 were consolidated into superseding indictment 72 Cr. 473. Appellant was named in Count One which charged a conspiracy with others from April 1, 1967 until December 18, 1971 to violate the narcotics laws. He was also named in Count Five which charged him with engaging with others from March 1, 1967 until December 18, 1971 in a continuing criminal enterprise in violation of Title 21, United States Code, Section 848.

Throughout the spring of 1972, serious discussions were undertaken between Eastern District Strike Force Attorney James O. Druker [1] and counsel for Vincent Papa,[2] one of appellant's codefendants in 72 Cr. 473 (A. 18, 19).

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[1] Druker was in charge of the prosecution of indictment 72 Cr. 473.

[2] Appellant was represented by the same attorney who represented Papa, Gino Gallina, Esq. No claim has been made by appellant's present attorney, Nancy Rosner, Esq., who was also part of the original defense team, that appellant's 1972 plea of guilty was in any respect tainted by Gallina's joint representation. See *United States* v. *Mari*, 526 F.2d 117 (2d Cir. 1975).

During the course of these continuous negotiations, events occurred which dictated the eventual plea agreement that was reached. On June 30, 1972, the Government's case was substantially weakened by the escape of its principal witness, Stanton Garland (A. 19). Bolstered by this serendipity, Papa's counsel pushed for a disposition which would satisfy all pending investigations in the Eastern District of New York, as well as the outstanding indictments involving their client. An integral aspect of these new negotiations was Druker's disclosure to Papa's counsel of an Internal Revenue Service investigation of Papa for tax evasion for the years 1967 through 1970 (A. 19).

On September 5, 1972, these continuous negotiations culminated in Papa entering a guilty plea to Count One of 72 Cr. 473 and Count Four of information 72 Cr. 1058 relating to tax evasion for the year 1970 (A. 55-94). The United States accepted these guilty pleas in satisfaction of 72 Cr. 473 and 72 Cr. 1058, as well as related investigations of Papa then pending in the Eastern District of New York. Papa was sentenced to concurrent five year terms of imprisonment (A. 99-102).[3]

On October 2, 1972, as part of this plea bargain negotiated by Papa, appellant's counsel and the United States, appellant entered a plea of guilty to a superseding information, 72 Cr. 1133, which charged appellant with conspiracy to violate the narcotic laws from April 1, 1969

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[3] Papa was subsequently indicted and tried in the Southern District of New York (Brieant, *J.*) on separate narcotics charges. On appeal, he contended that the prior plea bargain in the Eastern District barred his prosecution in the Southern District. In a lengthy opinion, *United States* v. *Papa*, — F.2d — (2d Cir., Slip op. 2977; April 2, 1976), this Court rejected Papa's claim bottomed on the double jeopardy and due process clauses of the Fifth Amendment.

to December 18, 1971 (A. 28-40). Appellant was sentenced to a five year suspended sentence at which time the government dismissed the outstanding charges contained in 72 Cr. 473 (A. 40-52).

Fearing the possibility of further prosecution, counsel for Papa and appellant discussed with the government exactly what their guilty pleas would cover. Druker advised that neither would be prosecuted by the Eastern District for crimes growing out of the narcotics conspiracy to which they pled, even if additional evidence became available (A. 19, 142-144). Further clarifying this understanding, Druker advised that overt acts alleged in the underlying narcotic indictments would not be "plucked out" of those conspiracies to form the basis of subsequent substantive counts in an indictment (A. 142-144). However, it was made clear that this plea bargain did not provide Papa and appellant with immunity from prosecution for unrelated criminal activities which occurred during this same time period (A. 144). In this regard Druker stated (testimony before Brieant, *J.*, January 16, 1975, A. 142, 144):

> I further made clear to them [counsel for Papa and appellant] that should a witness pop up who gave us evidence of unrelated criminal activities on Mr. Papa's part, even though it was during the same period of the conspiracy, that he was not covered on that.
>
> * * * * *
>
> I said I didn't want to give him a carte blanche for everything that he may have done in the past. I said he is covered on this conspiracy and that's it. I do remember using the term "carte blanche" and telling them that he was not going to be

> covered on everything that he had done during that period of time or prior." [4]

Appellant never received nor were any representations made by Druker to his attorneys regarding potential criminal liability involving income tax evasion (A. 19). Appellant's plea negotiations did not deal with any other criminal liability other than the narcotics conspiracy then contained in the outstanding indictment 72 Cr. 473. At the time of the entry of his guilty plea there were no outstanding income tax charges nor did appellant plead to any income tax indictment or information as did his co-defendant, Vincent Papa. Moreover, there has been no allegation by appellant that there was an income tax investigation pending against him at the time which, unlike Papa's, was not disclosed.

On April 14, 1975, the instant indictment was returned in the Eastern District of New York, this indictment, 75 Cr. 295, charges appellant with eight counts of filing false income tax returns and attempting to evade federal income tax for the years 1968, 1969, 1970 and 1971 (A. 1-5).

On January 21, 1976, the district court, in denying appellant's motion to dismiss this income tax indictment, rejected appellant's attempt to give an expansive effect to his earlier plea bargain regarding the narcotics charges. The court further found that no double jeopardy existed merely because the narcotics indictment referred to money made from that illicit venture (A. 9-10).[5]

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[4] Druker's testimony before Judge Brieant was part of the record in *United States* v. *Papa* (see footnote 3, *supra* at 3).

[5] The district court, in finding that there was no factual dispute regarding the issues raised, denied appellant's request for an evidentiary hearing (A. 10).

ARGUMENT

POINT I

The decision of the district court is not a final decision under 28 U.S.C. § 1291 and thus, the appeal should be dismissed.

In bringing this pre-trial appeal, appellant apparently relies upon this Court's recent decision of *United States* v. *Beckerman*, 516 F.2d 905 (2d Cir. 1975) to establish jurisdiction. However, we maintain that appellant's attempt to circumscribe the final judgment rule of Title 28, U.S.C. § 1291 by claiming that underlying the violation of his rights to due process under law is a violation of his Fifth Amendment right not to be twice placed in jeopardy is an improper extension of the decision of *United States* v. *Beckerman*. Moreover, policy considerations dictate that a further erosion of the general rule of non-appealability of interlocutory decisions is unwarranted.

The law is clear that pre-trial appeals are the exception and not the rule. In *Cohen* v. *Beneficial Industrial Loan Corp.*, 377 U.S. 541 (1949), the Supreme Court identified the characteristics of that "small class" of decisions where an appeal will lie even though a final judgment has not been entered: (1) the decision finally determines rights "separable from and collateral to" the main action, (2) those collateral rights are "too important to be denied review," and (3) those rights "will have been lost, probably irreparably" after final judgment is entered. *Id.*, 337 U.S. at 546.

This Court has repeatedly and unequivocally held that an order denying a motion to dismiss an indictment—even if based on a constitutional claim—is not appealable. *United States* v. *Garber*, 413 F.2d 284, 285 (2d Cir.

1969); *United States* v. *Foster*, 278 F.2d 567, 568-69 (2d Cir.), *cert. denied*, 364 U.S. 834 (1960); *United States* v. *Golden*, 239 F.2d 877, 878-79 (2d Cir. 1956); *see also*, *United States ex rel. Rosenberg* v. *United States District Court*, 460 F.2d 1233 (3d Cir. 1972). Such orders do not constitute a "final decision" in a criminal case from which an appeal may be taken. See *Parr* v. *United States*, 351 U.S. 513 (1956); *Berman* v. *United States*, 302 U.S. 211 (1937); see also *DiBella* v. *United States*, 369 U.S. 121 (1962); *Cobbledick* v. *United States*, 309 U.S. 323 (1940); *Cogen* v. *United States*, 278 U.S. 221 (1929); *Heike* v. *United States*, 217 U.S. 423 (1910).

We recognize that in *United States* v. *Beckerman*, *supra*, this Court found that a denial of a defendant's motion to dismiss an indictment on double jeopardy grounds satisfied the criteria of *Cohen*, 516 F.2d at 907. There, the defendant contended that a second trial would place him twice in jeopardy since the first trial ended in a mistrial when the jury reported a deadlock in reaching a verdict. The Court stated that these facts required ". . . a logical extension of the concept of appealability expressed in *Cohen*" *supra*, 516 at 907.

We submit, however, that the *Beckerman* holding should be limited to its facts, the situation where the defendant has been put to the vexation and expense of one trial and will have to go through it all again if his appeal is not heard prior to the retrial.[6] Where, as here, the claim rests on events occurring prior to any trial, the general rule should prevail that double jeopardy claims, like others, must await a final judgment before appeal is permitted.

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[6] "The right will be invaded if an accused . . . is called upon to suffer the pain of *two trails*." *Id.* at 906 (emphasis supplied.)

It has been established at least since *Rankin* v. *The State*, 11 Wall. (78 U.S.) 380 (1870), that the fact that a petitioner raises an issue of double jeopardy creates no exception to the rule that only final judgments are a predicate for appeal. In *Rankin*, the Supreme Court refused to hear petitioner's double jeopardy claim even though he was about to be tried in a State tribunal for offenses of which he had allegedly been earlier acquitted. Similarly, in *Heike* v. *United States*, 217 U.S. 423, 433 (1910), the Supreme Court held:

> "It may thus be seen that a plea of former conviction under the constitutional provision that no person shall be twice put in jeopardy for the same offense does not have the effect to prevent a prosecution to final judgment, although the former conviction or acquittal may be finally held to be a complete bar to any right of prosecution, and this notwithstanding the person is in jeopardy a second time if after one conviction or acquittal the jury is empanelled to try him again."

In *Heike*, the defendant claimed that he was about to be tried for offenses as to which the Government had earlier granted him complete immunity. Nonetheless, the Court held that appeal must await the outcome of the trial and the entry of judgment.[7]

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[7] It is true that the statute under which appeal was taken in *Heike*, 26 Stat. 826, c. 517, § 5 (March 3, 1891), did not use the term "final decision." However, the Court noted that prior decisions of the Supreme Court had restricted appeals to "cases in which there had been a final judgment," *id.* at 428, and found it to be the "settled practice of this court that a case . . . is only to be reviewed here after final judgment." *Id.* at 429. As a consequence, subsequent cases have viewed *Heike* as requiring "final decision" for appeal. *See, e.g., Corey* v. *United States*, 375 U.S. 169, 174 (1963); *Parr* v. *United States*, 351 U.S. 513, 517 (1956); *Radio Station WOW* v. *Johnson*, 326 U.S. 120, 123-24 (1945).

Not only are the *Heike* and *Rankin* decisions still good law,* but the Supreme Court has more recently indirectly affirmed that double jeopardy claims are no exception to the requirement of a final decision. In *Carroll* v. *United States*, 354 U.S. 394, 403 (1957), the Court noted that *Cohen* v. *Beneficial Industrial Loan Corp., supra*, did recognize a "small class" of non-final decisions from which immediate appeal might be taken. However, the Court said:

> "The instances [of interlocutory appeal] in criminal cases are very few. The only decision of this Court applying to a criminal case the reasoning of *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, held that an order relating to the amount of bail to be exacted falls into this category. *Stack* v. *Boyle*, 342 U.S. 1." [1951].

In view of this rather clear line of Supreme Court authority, it is not surprising that this Court prior to *Beckerman* refused to allow interlocutory appeals on double jeopardy issues. *United States* v. *Ford*, 237 F.2d 57, 67 (2d Cir. 1956), *vacated as moot*, 355 U.S. 38 (1957). In *Ford*, the trial court first directed a verdict of acquittal as to a count of the indictment on which the trial jury had deadlocked, then vacated the verdict of acquittal. Defendant argued on appeal that retrial on that count would subject him to double jeopardy. This Court held:

> "Since the order [vacating the directed verdict of acquittal] is interlocutory and the defendant has not yet been placed in jeopardy thereunder, the issue is not currently appealable and the pending appeal as to Count 1 must accordingly be dismissed."

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*See, e.g., *Corey* v. *United States, supra; Parr* v. *United States, supra; United States* v. *Golden*, 239 F.2d 877, 879 (2d Cir. 1956).

It is true that *Ford* was later vacated as moot by order of the Supreme Court, as a result of defendant's death on October 6, 1957. However, while the decision would concededly be ineffective for purposes of *res judicata* or collateral estoppel, *United States* v. *Munsingwear*, 340 U.S. 36 (1950), the Government submits that since the event causing the mootness occurred nine days after this Court rendered its opinion, the considered judgment of this Court in the controversy then before it is not without precedential value on the issue of law decided. See also, *Gilmore* v. *United States*, 264 F.2d 44, 46-47 (5th Cir.), *cert. denied*, 359 U.S. 994 (1959), cited with approval by this Court in *United States* v. *Kaufman*, 311 F.2d 695, 699 (2d Cir. 1963).

Of course, the underlying facts here differ substantially from those in *United States* v. *Beckerman*. Appellant was not subjected to a trial, but pled guilty as a result of a plea bargain. His attempt to give expansive effect to this plea agreement was properly rejected by the district court. Thus, while appellant's rights here are "separable from and collateral to" the underlying indictment, they are neither "too important to be denied review," or are rights which "will have been lost, probably irreparably" after final judgment. *Cohen* v. *Beneficial Industrial Loan Corp.*, *supra*, 337 U.S. at 546.[9] There-

[9] On January 20, 1976, this Court was confronted with a similar argument by appellant arising from a Southern District indictment naming him in five counts of narcotics violations. *United States* v. *Alessi, et al.*, — F.2d —, January 20, 1976 (2d Cir.), Docket No. 76-1021. There, in a necessarily hasty decision (the trial was to commence the day of this Court's decision) the Court failed to decide whether appellant's denial of due process claim is appealable but chose to treat his application as a petition for a writ of mandamus. This Court held that to subject appellant to a four week trial without the district court deciding appellant's due process argument justified the rare remedy of mandamus. Here, however, the district court considered and rejected appellant's due process claim.

fore, it does not follow that the concept of appealability should be extended in this case.

Moreover, an analysis of *United States* v. *Beckerman*, *supra*, and its underlying authority belies its application in this case. To support its conclusion that jurisdiction lies upon the denial of a defendant's motion to dismiss an indictment on grounds of double jeopardy, this Court relied upon the reasoning of *United States* v. *Lansdown*, 460 F.2d 164 (4th Cir. 1972). *United States* v. *Beckerman*, *supra*, 516 F.2d at 907. However, while this Court in *Beckerman* failed to indicate the scope of its decision, the Court in *Lansdown* was specific in that decision's application.

In *Lansdown*, as in *Beckerman*, the double jeopardy appeal arose from the trial court's declaring a mistrial in the first trial. Determining that a second trial would subject the defendant to double jeopardy, the court applied the rationale of *Cohen*, *supra* in determining that the court had jurisdiction. However, the court limited its decision ". . . to that very small number of criminal cases in which a mistrial is declared against the wishes of the defendant" [Footnote omitted]. *United States* v. *Lansdown*, *supra*, 460 F.2d at 172.[10]

In *United States* v. *Bailey*, 512 F.2d 833 (5th Cir. 1975) the Fifth Circuit held that it lacked jurisdiction to consider the district court's denial of the defendant's motions to dismiss on double jeopardy and speedy trial grounds. There, defendant, relying on *Lansdown*, contended that a second indictment subjected him to double jeopardy when the first trial was declared a mistrial

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[10] The Court again stressed this limitation to those mistrials ". . . instigated by the Court and opposed by the defendant, *United States* v. *Lansdown*, *supra*, 460 at 172 n. 10. Compare, *United States* v. *Dinitz*, — U.S. —, 96 S. Ct. 1075 (1976).

after he was granted a severance. The court, while noting that *Lansdown* carefully limited itself, thus distinguishing it from the facts before the court, nevertheless, rejected its underlying rationale. *United States* v. *Bailey*, *supra*, 512 F.2d at 837. The court reasoned that the facts were not of such a compelling nature to satisfy the standards delineated in *Cohen*. The court, while recognizing that the defendant would have to hazard another trial before he can obtain review of his double jeopardy argument, nevertheless found that "this case is no more distinguishable on finality grounds than a violation of any other constitutional right which results in the defendant's being subjected to the ordeal of a trial and conviction on the road to reversal." Id, at 837. See also, *United States* v. *Carsey*, 392 F.2d 810, 811 (D.C. Cir. 1967) where the court recited its previous refusal to entertain a writ of prohibition which sought to prevent the petitioner's fourth retrial for the murder of his wife.

The underlying facts here differ substantially from those in *Beckerman* and *Lansdown*. Appellant was not subjected to a trial, but pled guilty as a result of a plea bargain. His attempt now to give that plea agreement such expansive effect as to cover the instant indictment containing entirely separate offenses is so wholly lacking in merit that the district court rejected it without a hearing.

It must also be recognized that the right to appeal comes not from the Constitution but wholly from statute 28, United States Code, Section 1291. The assertion of a violation of a Constitutional right does not expand appellate statutory jurisdiction. Nor does it, or should it,

expand the term "final decision" to something contrary to its intended purpose. A Congressional policy to limit appeals only from final orders is strong in criminal cases where "delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of criminal law." *DiBella* v. *United States*, 369 U.S. 121, 126 (1962); Accord: *Cobbledick* v. *United States*, 309 U.S. 323, 324-326 (1940).

As the court stated in *Gilmore* v. *United States*, *supra*, 264 F.2d at 46, 47:

> ". . . But even if it were assumed that the second trial was forbidden as double jeopardy, that does not invest us with jurisdiction to vindicate such right. The Constitution does not guarantee an appeal. That comes wholly from the statute. There are many instances in which it is ultimately determined that constitutional rights have been violated. But the nature of the asserted right, *i.e.*, a constitutional one, does not distinguish appellate review of other rights, whether statutory or common law, or from a procedural rule. At least so long as a criminal case is pending, review of such maters, as for example, unlawful search and seizure, unlawful arrest, unlawful detention, unlawful indictment, unlawful confession, must await the trial and its outcome. This is so even though at the end of that trial, or an appeal from the judgment of conviction, it is ultimately determined that the violation of the constitutional right compels an acquittal. When that is the outcome, the individual accused may claim in a very real sense to have been subjected to a trial that ought never to have taken place. Congress might, as it has recently done in a very limited way for civil matters, 28 U.S.CA. § 1292(b), provide for interlocutory appeals to test such questions prior to trial and a final judgment in the traditional sense.

> Until Congress does so, the individual affected is witness to the fact that, 'Bearing the discomfiture and the cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship.' *Cobbledick* v. *United States*, 1940, 309 U.S. 323, 325, 60 S. Ct. 540, 541, 84 L. Ed. 783.
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> "The Constitutional right or the asserted violation of it, does not bridge the gap of appellate statutory jurisdiction. Nor, for like reasons, does it, through some reverse process, expand the term 'final decision' into something which, contrary to a long-settled Congressional policy, amounts in actuality to piecemeal review."

The United States submits that the impressive authority against interlocutory appeal, both for constitutional issues in general and double jeopardy issues in specific, requires that such appeals be permitted only where the defendant has actually experienced the rigors of one trial and seeks to avoid a second one. The Court in *Beckerman* was "obviously and properly influenced by the fact that the first trial had proceeded to verdict." *Illinois* v. *Somerville*, 410 U.S. 458, 467 (1973). *Accord*, *United States* v. *Gentile*, 525 F.2d 252 (2d Cir. 1975). That consideration, given weight in *Somerville* and *Gentile*, is absent in the instant case and effectively distinguishes it from *Beckerman*.

Against this background of authority, the district court properly rejected appellant's argument both on the theory of a denial of due process and double jeopardy. Moreover, the district court properly reached this decision without the necessity of a time-consuming pre-trial hearing since there was ". . . no substantial dispute about the facts, but primarily about the interpretation of what

took place . . ." (A. 10). By appealing this pre-trial order appellant has thwarted the public interest in prompt adjudication of criminal cases and in conservation of judicial reasources. Moreover, by allowing appellant to appeal a pre-trial order on due process grounds, this Court will open the door to all defendants, who having once pled guilty to charges and are subsequently indicted for other crimes, to pursue such dilatory tactics to impede the due administration of justice.

POINT II

Appellant's plea bargain in the narcotics conspiracy does not bar his prosecution in this case.

Appellant argues that the plea bargain negotiated between his attorneys and Eastern District Strike Force Attorney James Drucker in 1972, which culminated in his plea of guilty to an information charging a conspiracy to violate the narcotics laws during the period from April 1, 1969 to December 18, 1971, bars his prosecution in this case. The district court rejected this argument (A. 6-10). In the event that this Court should decide to consider the merits of appellant's claim on appeal, we believe the contention should similarly be rejected.[11]

Appellant in his brief (Brief, p. 7) correctly states that the six months of plea negotiations between Druker and co-defendant Papa's attorney (the same attorney

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[11] This argument, as well as a dismissal on double jeopardy grounds was raised by appellant in the Southern District of New York relating to an indictment (75 Cr. 772) which charges him with narcotics violations. In a memorandum decision and order dated April 6, 1976, Judge Bonsal rejected this motion.

who represented appellant) resulted in a "package deal" which included, among others, appellant. Similarly, it is agreed that the representations made by Druker to Papa regarding the coverage this plea bargain afforded him relating to the narcotics conspiracy charges, equally applied to appellant. However, Papa's resolution of his then pending income tax difficulties by including this in his eventual guilty plea, was unique to his situation and can not, by mere inference or conjecture of counsel, be attributable to appellant.

The scope of the plea bargain reached between Druker and Papa was fully aired in a hearing held before Judge Brieant in the Southern District of New York on January 16, 1975 (A. 106-181).[12]

Throughout these negotiations, Druker had told appellant's counsels that his coverage was limited to the "state of the law", that is, he would not be the subject of prosecution for "another piece of the same conspiracy" to which he was to plead; that he would not "be indicted for, reindicted or rearrested for any piece of this conspiracy . . . [this] chain of the ladder." (A. 142-148).[13]

Druker emphasized the limitations that existed in this agreement (A. 144):

> I said I didn't want to give him carte blanche for everything that he may have done in the past. I

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[12] Appellant concedes that the Papa plea negotiations were intended to cover appellant (Appellant's brief, p. 8) and Judge Judd similarly found that appellant's ". . . plea was made in reliance on the same discussions . . ." Papa's attorneys had with Druker (A. 8).

[13] Actually Druker went beyond "the state of the law" by promising that any of the overt acts in the underlying narcotics conspiracy would not be "plucked out" of the conspiracy to form the basis of substantive counts in additional indictments (A. 146) *United States* v. *Cioffi*, 487 F.2d 492, 498 (2d Cir. 1973), *cert. denied*, 416 U.S. 995 (1974).

> said he is covered on this conspiracy and that's it. I do remember using the term 'carte blanche' and telling them that he was not going to be covered on everything he had done during that period of time or prior.

The tax investigation pending against Papa became part of these plea negotiations when Druker revealed its existence to counsel in June, 1972 (A. 147). Thus, Papa's subsequent guilty plea to one count of an information charging him with income tax evasion was in full satisfaction of the I.R.S. investigation of Papa (A. 147, 148).

At no time did appellant's counsel bargain for, or even raise appellant's potential criminal liability to charges other than those contained in the pending narcotics indictment (A. 19).[14] (We suppose, for fear of instilling an idea that hadn't occurred to the prosecutor). The district court in acknowledging the fact that there was no tax indictment pending and that appellant did not plead to an information containing tax violations found that no such promise was made to appellant (A. 9-10). The record being completely devoid of such an agreement, appellant's desperate attempts to benefit from his co-defendant's plea bargain must fail.

Finally, regardless of his other erroneous contentions, appellant's conclusion that the instant income tax charges arise from his past illicit narcotics ventures as manifested

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[14] Appellant's squad of lawyers (Ms. Rosner and Messrs. Theodore Rosenberg and Gallina) all of whom are hardly new to the arena of plea bargaining, could hardly have believed Druker's silence would provide appellant with immunity for unrelated offenses.

in the Eastern District narcotic indictment is incorrect. Indeed, it was exactly this type of specious argument Druker attempted to avoid by advising appellant's counsel (A. 144):

> I didn't want to give him a carte blanche for everything that he may have done in the past. I said he is covered on this conspiracy and that's it. I do remember using the term 'carte blanche' and telling them that he was not going to be covered on everything that he had done during that period of time or prior.

Appellant contends that Druker promised him that he would not be prosecuted ". . . for any substantive offense committed in the course of the conspiracy" (Appellant's brief, p. 17). Moreover, appellant argues, since his plea bargain and subsequent guilty plea was in satisfaction of indictment 72 Cr. 473 which contained a charge of Title 21, U.S.C. § 848—a continuing criminal enterprise—he was placed in jeopardy because the income tax charges are offenses committed in the course of these conspiratorial activities. To support this argument, appellant asserts that the government would have offered the same evidence in this tax case to support a conviction under the Section 848 offense. Accordingly, he argues, the instant prosecution is barred.

This claim, improper both as to the law and facts, was properly rejected by the district court. While we concede for purposes of this argument that appellant, while his plea remained in force could not have been subsequently prosecuted for the same crimes alleged in indictment 72 Cr. 473 by reason of double jeopardy, even though they were dismissed by the Government,[15] the law

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[15] As Judge Friendly stated in *United States* v. *Cioffi*, 487 F.2d 492, 496, n. 2 (2d Cir. 1973), *cert. denied*, 416 U.S. 995

[Footnote continued on following page]

is clear that the income tax charges in the instant indictment are not barred by double jeopardy. This Court has already held that a prosecution under Section 848 is distinct and separate from a prosecution for the conspiracy and substantive offenses that may constitute part of the evidence of the continuing criminal enterprise. See, *United States* v. *Sperling*, 506 F.2d 1323, 1343 (2d Cir. 1974) (Sperling convicted of separate substantive (§ 841), conspiracy (§ 846) and continuing enterprise (§ 848) offenses and sentenced separately on each); *United States* v. *Ortega-Alvarez*, 506 F.2d 455 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975). There can be no question that tax evasion offenses are also separate and distinct offenses. Under the relevant case law, therefore, even had appellant been tried on the Section 848 count and been convicted or acquitted, double jeapordy would not have barred prosecution for income tax evasion. The Section 848 charge having been dismissed, appellant is certainly entitled to no more.

Similarly, appellant's futile attempt in the district court to bar prosecution on double jeapordy grounds failed on an analysis of the facts. It is abundantly clear, as the district court found, that the offenses here in question are entirely separate in fact and the crimes are different (A. 9). Thus, there was no double jeopardy. See, *Gore* v. *United States*, 357 U.S. 386, 392-393 (1957); *United States* v. *Nathan*, 476 F.2d 456, 458-459 (2d Cir.), *cert. denied*, 414 U.S. 823 (1973).[16]

(1974): "The Government does not dispute that the dismissal granted on its motion had the same effect as the acquittal directed by the judge." *Compare, United States* v. *Gogarty*, — F.2d — (2d Cir. Slip op. 3075, 3079; April 6, 1976).

[16] Moreover, in no sense is the Government invoking the "same offense" test to, as Judge Friendly stated, "the point of rigid formalism." *United States* v. *Cioffi*, *supra*, at 497.

Further undermining appellant's argument, the Government advised the district court as to its proof it intended to offer in the tax evasion case. Appellant's late filing of his returns establishes all the necessary elements of the offense except proof of criminal intent. The Government intends to prove the necessary intent through expenditures of appellant. While the Government will attempt to introduce income derived from appellant's narcotics ventures as further evidence of criminal intent, this is not necessary to prove a prima facie case (A. 193-194).

Thus, it is clear that double jeopardy does not bar prosecution of appellant for income tax evasion. Also, the record clearly shows, as Judge Judd so found, that appellant's prior plea bargain agreement did not contemplate the instant charges. In sum, what we have here, is appellant attempting to obtain from this Court precisely what he and his team of attorneys throughout months of negotiations were expressly denied by Druker: "carte blanche" immunity for all other contemporaneous and past criminal activity.

CONCLUSION

The appeal should be dismissed, in the alternative, the order of the district court should be affirmed.

Respectfully submitted,

Dated: April 14, 1976

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AFFIDAVIT OF MAILING

COUNTY OF KINGS
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 16th day of April 19 76 he served ~~a copy~~ two copies of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Nancy Rosner, Esq.
401 Broadway
New York, N. Y. 10013

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, ~~Washington Street~~ 225 Cadman Plaza East, Borough of Brooklyn, County of Kings, City of New York.

Lydia Fernandez
LYDIA FERNANDEZ

Sworn to before me this
16th day of April 19 76

Olga S. Morgan
OLGA S. MORGAN
Notary Public, State of New York
No. 24-4501966
Qualified in Kings County
Commission Expires March 30, 1977